JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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AFFIDAVIT.

Brenneman v. State, 93 N. E. 997, Ind. *Sufficiency.* Burns' Ann. Stat. 1908, Sec. 2280, provides that anyone entering unlawfully on the land of another, who shall be forbidden "to do so" by the owner, and shall thereafter enter, shall be guilty of trespass. An affidavit before a justice of the peace alleged that defendant unlawfully entered upon the land of one N, "and, having been forbidden by the said N, the owner thereof," did unlawfully enter. Held, that the affidavit was not insufficient for failure to add the words "so to do" after the allegation "forbidden by the said N," Burns' Ann. Stat., Sec. 2063, cl. 10, providing that no affidavit shall be quashed for any defect not prejudicial to the substantial rights of defendant.

ASSAULT.

State v. Murray, Kan., 110 Pac. 103. *Defense of Insanity.* On the trial of a charge of assault with intent to kill, the defense was temporary insanity caused by the conduct of the person assaulted with the wife of the defendant. By statute voluntary manslaughter at common law was made manslaughter in the fourth degree and punishment was provided for an assault with intent to commit manslaughter. The defendant was convicted of an assault with intent to commit manslaughter. Defendant appealed upon the ground that if he were not mentally responsible he was guilty of no crime whatever, and if he were mentally responsible he was guilty of assault with intent to kill. Held, that if the defendant, in the heat of passion, reasonably provoked by the conduct of the victim of the assault with the defendant's wife, had intentionally killed him, the crime would have been manslaughter in the fourth degree. If he made the assault under the same circumstances with intent to kill, he would be guilty of assault with intent to commit manslaughter. Hence, the crime of assault with intent to commit manslaughter was possible both in fact and in law, and if the jury took that view of the evidence the defendant could not complain.

APPEAL AND ERROR.

Morris v. U. S., 185 Fed. 73. *Mandate and Proceedings in Lower Court.* Where a defendant was convicted in a criminal case, in which the court had discretionary power to impose upon him the costs of prosecution under Rev. St. (U. S. Comp. St. 1901, p. 703), and the court imposed separate sentences on different counts of the indictment, under one of which he was compelled to pay the costs, on a reversal by the appellate court as to such count only, and the issuance of a mandate affirming the judgment as to the other counts, but directing the trial court to sustain the motion in arrest as to such count, that court had no power to modify the judgment as to any of the other counts, by adding the imposition of costs.

BURGLARY.

Unseld v. Commonwealth, Ky., Ct. App., 131 S. W. 263. *Status of Appurtenant Building.* Defendant broke into a meat house situated in the yard in which the owner's dwelling had stood. The dwelling had burned shortly before and the owner had since lived with his family in a schoolhouse, 200 or 300 yards distant, and not on his land. Held, as the meat house had been used by the owner and his family in conjunction with his residence before that was burned, and was used in conjunction with his temporary residence at the time of the crime, it was appurtenant to and parcel of his dwelling place. The test is the use and proximity. The appurtenant building need not be in the same enclosure, nor on land owned by the same person. As the meat house was in sight of his temporary dwelling, within a minute's walk, and available by its situation for all the uses of a smoke house, it was within the protection of his dwelling. Conviction of statutory breaking and entering affirmed.

CONDUCT OF TRIAL.

Commonwealth v. Bolger, 79 Atl. 113, Pa. *Reading Evidence to Jury.* It is reversible error for the judge, after retirement of the jury and upon their request, to permit their recollection to be refreshed by reading to them a portion of the testimony actually delivered on trial concerning which misapprehension had arisen in their minds.

State v. Lieberman, 79 Atl. 331, N. J. *Coercing Jury.* A statement in the charge that the jury should come to a conclusion that the case, being tried for the second time, was of great importance, and that the jury should come to a conclusion one way or the other, is not objectionable as coercing the jury into reaching a verdict.

CONDUCT OF THE JUDGE.

People v. Saunders, Cal., Ct. of App., 110 Pac. 825. *Error.* During a trial for the crime of arson the court took a very prominent part in the examination of the witnesses, at times taking them out of the hands of the prosecuting attorney and conducting the examination. The record showed that the court's questions were pertinent and indicated no leaning against the defendant. Held, the action of the court was not error.

People v. Grider, Cal., Ct. of App., 110 Pac. 586. *Error.* A vital element in connection with all irregularities or misconduct of court, counsel, parties, or jury, is, Are the substantial rights of the complaining party materially affected thereby? If so, it will be presumed that he was injured unless the contrary affirmatively appears. The burden is on the moving party to show the irregularity or misconduct which might have prevented a fair trial. When this is done the burden shifts to the successful party to show as a matter of fact that the irregularity or misconduct did not affect the result. As it was not shown that the misconduct of the district attorney did not influence the jury in this case, the conviction was reversed.

CONSTITUTIONAL LAW.

People, ex rel. St. Clair, v. Davis, 127 N. Y. Suppl. 1072. *Right to Jury Trial.* Laws 1905, Ch. 610, providing as punishment for soliciting commitment

to the State Reformatory for Women, is not unconstitutional as violating Art. 1, Sec. 6, in that it does not provide for a common law trial by jury.

Carr v. State, 93 N. E. 1071, Ind. *Class Legislation.* Act of March 9, 1909 (Laws 1909, Ch. 175), repealing so much of Act of March 10, 1905 (Laws 1905, Ch. 169), as makes it unlawful for anyone to play baseball on Sunday, is valid as within the power of the legislature to withdraw a class from the inhibition of Sunday labor and is not in conflict with Const., Art. 1, Sec. 23, prohibiting the granting of privileges to one class of citizens.

Warren v. U. S., 183 Fed. 718. *Freedom of Speech.* Act of Congress, September 26, 1888, Ch. 1039, 25 Stat. at Large, 496 (U. S. Comp. St. 1901, p. 2661), forbidding deposit in the mails of anything upon the exposed surface of which appears language scurrilous, defamatory, threatening or calculated and obviously intended to reflect injuriously on the character or conduct of others, is not objectionable as denying or abridging freedom of speech. Where accused deposited in the postoffice a stamped envelope, on the face of which was printed in large red letters, "$1,000 Reward will be paid to any person who kidnaps Ex. Gov. Taylor and returns him to Kentucky authorities," such deposit violates the above statute.

COURTS.

Commonwealth v. Rusic, 79 Atl. 140, Pa. *Power to Amend Record.* The court of oyer and terminer has power, even atfer the term, to amend its record in a murder case to conform to the truth.

Ex-parte Boose, 94 N. E. 401, Ind. *Concurrent Jurisdiction.* Under Senate Bill No. 73, Acts 1911, which went into effect March 4, 1911, providing that a petition by an appealing defendant to be admitted to bail pending appeal may be filed either in the trial court or in the appellate court, where a petitioner exercised an election and applied to the trial court and was denied bail, he could not present the same question to the Supreme Court except by appeal.

CORRUPT PRACTICES AT ELECTIONS.

Commonwealth v. Glass, Ky., Ct. App., 131 S. W. 494. *Intimidation.* By statute no one could vote unless he presented to the election officers his certificate of registration. Another statute made it a fenony to unlawfully attempt to prevent a voter from casting his ballot. A third made it a misdemeanor to bribe a voter. Defendants were indicted under the second statute. The proof was that they bought the voter's certificate of registration, taking it for the fraudulent purpose of preventing him from voting at the election. Held, the second statute was not violated, as it did not include acts done with the consent of the voter, but applied to forcible interference with the voter, and to any device by which the freedom of elections was destroyed. It was said that the act was a violation of the third statute, as buying the election certificate was equivalent to bribing the man not to vote. The purpose of the statute is to prohibit the use of money in influencing elections, and it makes no difference between a person who for money votes for a certain candidate and the person who for money is induced to refrain from voting.

EVIDENCE.

People v. Mack, Cal., Ct. of App., 110 Pac. 967. *Admissibility.* On cross-examination of a witness for the defendant he was asked whether or not he

had certain conversations with the complainant in which he tried to induce her to drop the prosecution, and answered, "No." The prosecution was allowed to prove these conversations in rebuttal. In one of them he said the defendant ought to be in jail. Held, the evidence was properly admitted to show the bias of the witness, and the statement that the defendant ought to be in jail simply showed the strength of his interest and the lengths he was willing to go to aid a friend.

People v. Saunders, Cal., Ct. of App., 110 Pac. 825. *Degradation of Defendant.* On a trial for arson, defendant's counsel objected to a question asked by the deputy district attorney on the ground that it would tend to degrade defendant. The deputy district attorney said: "The character of the defendant is being degraded as we go along; that is our object." The objection was overruled. Held, the question could not be excluded because it tended to degrade the character of the defendant. It is only when the answer will tend to degrade the character of the witness that he is excused from answering it under the statute. While the remark of the prosecuting officer would better have been left unsaid, it is too trivial to be a ground for reversal.

McQueary v. People, Colo., 110 Pac. 210. *Admissibility.* In reply to a question a witness gave an answer that was not responsive and was incompetent and immaterial. The court denied defendant's motion to strike out this answer. It was of too trivial a nature to influence the jury. Held, that while the refusal to strike was error, it was not prejudicial and hence not a ground for reversal. Over the defendant's objection, the prosecution was permitted to prove that the reputation of the prosecutrix for truth, veracity and chastity was good, though her character in these respects had not then been attacked by the defense, but it subsequently was attacked. Held, while it was error to admit it, the error was cured by the subsequent attack on her character. As the evidence became admissible on rebuttal, and the only error was its introduction in improper order, this was not a ground for reversal.

FORMER JEOPARDY.

Gavieres v. U. S., 31 Sup. Ct. Repr. 421. *Same Offense.* The offenses of behaving in an indecent manner in a public place, open to public view, punishable under municipal ordinance, and of insulting a public officer by deed or word in his presence, contrary to P. I. Pen. Code, Art. 257, are not identical, so that a conviction of the first will bar a prosecution for the other, although the acts and words of the accused set forth in both charges are the same.

HOMICIDE.

Ex-parte Heigho, Idaho, 110 Pac. 1029. *Death from Fright.* A petitioner in *habeas corpus* was held on a charge of manslaughter. Having heard that one Barton had made derogatory remarks about him, the petitioner armed himself and, with a friend, went to see Barton. After some conversation, petitioner struck Barton with his fist, and Barton retaliated. Barton's wife interfered, separated them, and petitioner and his friend left. Barton's mother-in-law saw petitioner's revolver and became very much excited for fear petitioner would kill Barton. She had an aneurism of the ascending aorta and the excitement caused this to rupture and kill her. Held, the fact that the death was caused by fright, fear or terror alone, without any hostile demonstration

or overt act to the person of the deceased, does not, as a matter of law, prevent the homicide from being manslaughter. Hence, the prisoner should be remanded into custody for trial.

State v. Meyers, Ore., 110 Pac. 407. *Defense.* Defendant was arrested by a police officer. He shot and killed the officer on the way to the station. The arrest was illegal, as the officer had no warrant, and had no reasonable ground to suspect the prisoner of having committed a crime. Held, where the arrest is made by a known officer, and nothing is to be reasonably apprehended beyond a mere temporary detention in jail, resistance cannot be carried to the extent of taking life. The illegal arrest would neither justify a killing, nor would it, as a matter of law, have the effect of exciting in the mind of the prisoner a sudden heat of passion such as to make the desire to kill irresistible, and, therefore, manslaughter.

State v. Vance, Utah, 110 Pac. 434. *Separate Counts.* On a trial for murder, the state elected to stand upon a count which charged that deceased died from the combined effects of a beating inflicted on one day and of poison administered the next day by the same person. Held, that, though the count referred to two separate transactions, the state could not be required to elect between the beating and poisoning, because in legal effect but one transaction was stated, being the result produced by these two coöperating causes. But on the charge thus made, there could be no conviction on proof that death was due to either one of these causes alone. Had the pleader desired to rely upon the two causes separately, he could have charged death by each in separate counts, or stated that deceased was killed by means unknown, and thus have proved any means upon the trial; or, by statute, have stated the means in the alternative in the same count; or have stated the means as continuous and that death was ultimately caused by the means described, which would permit him to prove that death was by any one or more, or by a combination of two or more, of the means alleged. The case contains an interesting answer to Prof. Wigmore's criticism of the Shockley Case, 29 Utah, 25, 80 Pac. 865, 110 Am. St. Rep. 639.

People v. Petruzo, Cal., Ct. App., 110 Pac. 324. *Instruction.* On a trial for murder, the court charged that if the defendant was present aiding and abetting in the commission of the unlawful act, and if in the commission of the said unlawful act the deceased was killed, the crime would be murder in the first degree. The only unlawful acts of which there was any evidence were deliberate attempts to kill deceased and his associates, and possibly to commit robbery. Held, that the instruction was erroneous, considered abstractly, since killing in the commission of an unlawful act might be manslaughter. But as any killing while the defendant was engaged in either of the unlawful acts indicated by the evidence would be murder in the first degree, the error was not prejudicial. Hence, the conviction of murder in the first degree was affirmed.

Territory v. Eagle, N. Mex., 110 Pac. 862. *Dying Declaration.* On a trial for murder, a statement made by the deceased shortly before his death was offered in evidence as a dying declaration. There was nothing in the declaration itself or in anything said by the deceased which indicated that he realized his condition and had surrendered all hope of recovery, and he had not been told that he could not recover. But the wound was of such a terrible nature and the deceased was suffering so severely that it must be inferred therefrom

that he was conscious of his condition and under the sense of impending death when he made the declaration. Held, the declaration was properly admitted.

State v. Reese, 79 Atl. 217, Del. *Self-defense.* In order to render admissible evidence as to previous quarrels, threats and assaults, as between deceased and accused, where self-defense is relied on in a homicide case, it must appear that deceased indicated, by act or demonstration at the time of the killing, a real or apparent intention to kill or inflict great bodily harm upon accused, and thereby induced the latter to reasonably believe that it was necessary to kill to save himself; and, hence, where accused had forgiven deceased, her husband, for all beatings he had inflicted on her prior to the night of the killing, and they had continued to live together as man and wife, evidence of the quarrels, threats and assaults of deceased previous to the time when they separated on such night was inadmissible. Since no one may take the life of another, even in self-defense, unless there is no other escape from death or great bodily harm, it is the duty of one attacked to retreat if he can safely do so, or to use such other reasonable means as are within his power to avoid killing his assailant.

State v. Reese, 79 Atl. 217, Del. *Accidental Killing.* Under the statutes making the intentional pointing of a deadly weapon at or toward another a misdemeanor, and providing that when death results from an unlawful act, though not malicious, the one doing the killing shall be guilty of manslaughter, one accused of homicide cannot be acquitted on the ground that the shooting was accidental, if the gun was intentionally pointed at deceased.

Clark v. State, Tex., Ct. Cr. App., 131 S. W. 556. *Accessory Before the Fact.* Defendant was indicted for murder in the first degree and convicted. The trial court charged that if the crime was committed by several persons acting in pursuance of a common design, all were guilty, whether they were present when the crime was committed or not. There was some evidence that the defendant advised the persons who committed the crime, furnished the gun, and a mule for one of them to ride to the place, but was not himself present when it was committed. Held, if he were not present, he was an accessory before the fact, but not a principal, and could not be legally convicted on an indictment charging that he was a principal. Hence, the conviction was reversed for the error in the charge of the court.

Tappscott v. Commonwealth, Ky., Ct. App., 131 S. W. 487. *Self-defense.* A father and three sons were indicted for murder. Children's Sunday had been observed by an all-day church meeting. Four young men in attendance brought a half-gallon of whiskey, which was drunk about the church during the day. As some of the attendants at the service were leaving they got into a quarrel. Deceased went toward them to settle it. One son, thinking that deceased was coming to take part in the quarrel, knocked him down with a rock, which fractured his skull. Deceased arose and, mistakenly thinking the father had struck him, attacked him with a knife. Another son then shot and killed deceased. Held, the son had the same right to kill deceased in defense of his father that the father himself had to kill in his own defense. If it was apparently reasonably necessary to kill deceased to save the father's life, the killing was justifiable, although the altercation was begun by one of the defendants.

Lewis v. Commonwealth, Ky., Ct. App., 131 S. W. 517. *Carelessness of Policeman.* A prisoner, who had been arrested for a misdemeanor, broke away from the officer and ran. The officer ordered him to stop, then pursued him

and fired several shots after him, one of which killed him. The officer testified that he had fired over the prisoner's head to try to stop him; that he did not intend to hit him; that he stumbled and nearly fell, and that his self-acting pistol was accidentally discharged, inflicting the fatal wound. Held, the officer had no right to shoot the prisoner to prevent his escape. If he intended to hit the prisoner or to shoot over his head, and had reason to know that he was thereby endangering his life, and fired the pistol recklessly and without malice, he was guilty of voluntary manslaughter. If he did not intend to shoot at all, and the pistol was discharged accidentally when he stumbled, then it was an accidental homicide. But if he did not exercise reasonable care in handling his pistol, he was guilty of involuntary manslaughter, though he did not intentionally fire the fatal shot.

Ollora v. State, Tex., Ct. Cr. App., 131 S. W. 570. *Error.* Defendant was convicted of murder in the second degree. By statute the clerk of court was required to issue a writ commanding the sheriff to serve a certified copy of the names of the persons summoned under the special venire on the prisoner. This had been done and the list of names given to the prisoner, but the writ did not bear either the seal of the court or the file mark of the district clerk. The court later ordered the writ to be amended by the clerk and the seal and file marks were then affixed. Held, the file mark may, under the direction of the court, be affixed to a paper as of the date when in fact it was filed. But as the seal had not been affixed when the process was issued, the writ was defective. To permit it to be affixed, when objection was made, so as to relate back to the time of its original issuance, would deny the appellant the right of a copy of the venire made out under the safeguards and sanctioned formalities of the law. The case should have been postponed and service of a copy of the venire, properly attested by the clerk, been made. The conviction was reversed.

INDICTMENT.

U. S. v. Long, 184 Fed. 184. *Sufficiency.* Where an indictment alleged that defendant, being then and there a clerk in the employ of the government in the United States land office at D, during his continuance in office, did wrongfully and unlawfully agree to receive compensation for services rendered to a public land entryman, etc., sufficiently charges that accused was an official or clerk of the government.

People v. Wenk, 127 N. Y. Suppl. 702. *Surplusage.* Under Code Cr. Proc., Sec. 285, defining the sufficiency of an indictment, the word "feloniously" in an indictment charging a misdemeanor may be disregarded.

State v. Rankard, Mo., Ct. App., 131 S. W. 168. *Defect.* Defendant was convicted of selling cocaine without the written prescription of a licensed physician. The information on which the conviction was based charged the sale of the cocaine without a prescription for the use of the person to whom it was sold, but did not state that it was not prescribed for some other person. Held, the information must fully negative the exception contained in the statute. As it was consistent with the charge that the cocaine sold was properly prescribed for some third person, the information was fatally defective, and the conviction reversed.

Petty v. State, Tex., Ct. Cr. App., 131 S. W. 215. *Defect.* A complaint

sworn to on the 3d day of January, 1910, charged that the offense therein set forth was committed on the 3d day of February, 1910. Held, the complaint must charge that the violation of the law occurred prior to the making of the affidavit. Conviction reversed.

Ammerman v. U. S., 185 Fed. 1. *Sufficiency.* An indictment for perjury, alleging that on the trial of a criminal case it was a material inquiry whether the defendants were in a certain town "during the day or night of the 28th and early in the morning of the 29th" of a certain month, and that defendant falsely and corruptly testified on said trial that two of said defendants were in another state up to 8 or 9 o'clock on the morning of the 28th, sufficiently showed that such testimony was material, although it did not specifically so allege, nor that, if true, it would exclude the guilt of the defendants on trial to whom it related; it being sufficient that such testimony was competent, and its exclusion would have been error.

People v. Miller, 128 N. Y. Suppl. 549. *Sufficiency.* Under Code Cr. Proc., Sec. 275, requiring the indictment to contain a plain and concise statement of the act constituting the crime, without unnecesary repetition, that the name of the crime is incorrectly stated in the accusatory part of the indictment is immaterial if the specific allegations of fact are sufficient, since the latter in such case control the character of the crime presented by the indictment.

INSTRUCTIONS.

State v. Brauneis, 79 Atl. 70, Conn. *Rape.* In a trial for assault with intent to rape, where it was not disputed that complainant was assaulted by someone with intent to ravish her, she being corroborated by eye-witnesses of the assault, and the jury were fully instructed as to the nature of the intent to be proved by the state to warrant conviction, the refusal of an instruction that "it was the settled law of this state that rape is an accusaion easily to be made, hard to be proved, and harder to be defended by the party accused, though ever so innocent," was proper.

JURY.

State v. Reese, 79 Atl. 217, Del. *Competency.* That a juror was a member of the coroner's jury, which had heard evidence and held accused for murder, was not a sufficient ground for challenge for cause.

LARCENY.

Wilson v. State, Ark., 131 S. W. 336. *Intent.* Defendant took a bull from the range, believing it to be his own, and kept it several months. He then learned that it belonged to another, but subsequently sold it. He was convicted of larceny. Held, while there is authority that the intent to steal need not exist at the time of taking, if the original taking is a trespass, followed by a subsequent wrongful conversion, this rule does not apply when the property is originally taken in good faith under an honest belief of ownership, for there is here no willful trespass. Conviction reversed.

INSANITY.

State v. Strasburg, Wash., 110 Pac. 1020. *Defense.* A statute provided that insanity, idiocy or imbecility should be no defense in a criminal prosecution, and that no testimony or other proof thereof should be admitted in evi-

dence, but that whenever, in the judgment of the court trying the same, any person convicted of crime was at the time of its commission insane, idiotic or imbecile, or was so at the time of his conviction or sentence, the court might direct such person to be confined for treatment in one of the state hospitals for the insane or in the insane ward of the state penitentiary until he should have recovered his sanity. Under this statute, on a trial for assault, the court excluded evidence tending to prove that the defendant was insane when the assault was committed. Held, the statute violated the provisions of the state constitution that, (1) "No person shall be deprived of life, liberty, or property without due process of law," and, (2) "The right of trial by jury shall remain inviolate." Three judges thought the statute unconstitutional because at the time the constitution was adopted persons who were so insane that they could not have a criminal intent were incapable of committing crime. Defendant's right to prove his insanity at the time of committing the act was as perfect as his right to prove that he did not commit it. The right of trial by jury gives the accused the right to have a jury pass upon every substantive fact going to his guilt or innocence. To take from him the opportunity to prove insanity is as much a violation of his constitutional right to trial by jury as to take from him the right to prove before a jury that he did not commit the act charged. While the legislature can provide for the punishment of some acts, regardless of the intent or want of intent with which they may be committed, there is no authority for the exercise of the power to conclusively impute an intent to commit crime to an insane person, or to withhold from him the right to prove insanity in his defense.

An insane person cannot be rendered amenable to the criminal law of the state as long as those laws have in them an element of punishment, nor can one accused of crime be branded as a felon without any consideration by the jury trying him of the question of his insanity at the time of the act. As the accused has the right to have the question of his insanity submitted to the jury, the section of the statute providing for his disposition if the court considers him insane need not be discussed. The argument that the present purpose of the criminal law is to instruct, educate and reform, rather than further debase, the individual, is contrary to the fact that the element of punishment is still in our criminal law. As long as this is the spirit of our laws, though it may be much mellowed in the treatment of the convicted, in comparison with former times, the constitutional rights must be given full force and effect in a trial upon a criminal charge.

Four judges thought that the legislature did not intend to punish one for the commission of crime when, by reason of his insanity, idiocy or imbecility. he was not able to comprehend the quality of his act or to understand that it was wrong, but intended to minimize the evils resulting from the defense of insanity in homicide cases by changing the time and mode of trial of the issue of insanity. But as the statute left it to the discretion of the trial judge to decide whether the accused was insane, with no charge of insanity preferred against him, and an express provision that no testimony or other proof of the mental condition of the accused should be admitted in evidence, gave the accused no notice of the proceeding to adjudge him insane, nor opportunity to offer testimony or to be heard in his own defense; as the court might adopt its own procedure, free from all constitutional restraints, might counsel with experts,

or might act as its own expert, a judgment depriving him of his liberty on the ground of insanity might be rendered without due process of law.

If the legislature did intend to abrogate the defense of insanity, and to place the sane and the insane, the idiotic and the imbecile on the same footing before the criminal law, the act was unconstitutional. The police power does not warrant punishment for an act which the utmost care and circumspection would not enable the one who did the act to avoid. Deprivation of liberty is a punishment, and you cannot change the effect by changing the name. Statutes providing that a person acquitted of crime on the ground of insanity should be confined in insane hospitals have been declared unconstitutional. There is little difference between a person found guilty of crime while insane, and one found not guilty by reason of insanity, for in both cases the two facts co-exist, insanity, and violation of law.

The provision that lunatics, idiots, or imbeciles, should be tried though they were mentally defective at the time of trial violates the constitutional rights to appear and defend in person, and to be informed of the nature of the accusation, as these rights are of no avail to a man bereft of reason.

One judge thought that the legislature had the constitutional power to decree that insanity should not be a defense to crime, but held this act unconstitutional because it left the question to the arbitrary announcement of the court, unaided by the only means known to our law for the ascertainment of facts in judicial procedure. The question should be determined by the jury as any other fact, and if in their judgment the accused committed the act, but was insane at the time of its commission, they should so determine, and the court should then pronounce such judgment as the law may provide.

judge thought that the law was constitutional.

MALICIOUS MISCHIEF.

State v. Wright, Del., 79 Atl. 370. *Nature of Offense.* Malice, as an element of malicious mischief, is not restricted to ill-will or revenge against the owner or possessor of the property injured; but a wilful or wanton injury to property, under circumstances indicating a malignant spirit or mischief, is sufficient to constitute malicious mischief, and such malice may be either express or implied.

OPERATION OF SCENIC RAILWAY.

Ex parte Hull, Idaho, 110 Pac. 256. *Construction of Statute.* The petitioner was convicted of operating a "scenic railway" on Sunday, and brings habeas corpus. The statute prohibiting keeping "any theatre, play house, dance house, race track, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling alley, variety hall, or any such place of public amusement open on Sunday." Held, as the amusement is not per se unlawful or criminal, nor is it immoral, or dangerous, or detrimental to the public health, the statute will not be construed to prohibit it unless the prohibition is contained therein in positive terms, or by clear implicaton. The operaton of the scenic railway is not as noisy as is the merry-go-round, and it is not usually located in the residence portion of a city as is the merry-go-round, and consequently is less likely to disturb those who are not using it. It is not, therefore, so clearly like a merry-go-round as to be necessarily included in the phrase "any such

place of public amusement." Hence, the act upon which the conviction was based is not a crime and the petitioner should be discharged.

But a moving picture exhibition is properly included under the words "theatre, play house or show," and if not is sufficiently like them to be under "such place of public amusement." Hence, keeping a moving picture exhibition open on Sunday is prohibited by the statute. *Ex-parte Bossnerr,* Idaho, 110 Pac. 502.

PERJURY.

Commonwealth v. Miles, Ky., Ct. App. 131 S. W. 385. *Elements of.* An indictment for perjury charged that defendant falsely and corruptly testified in a prior suit that another person was not at a certain church on a certain Sunday, when in fact "defendant was not at said church and did not know whether he was there . . . or not there on said date. . . ." Held, if one willfully and corruptly swears to a fact as of his own knowledge, when he in truth had not the knowledge, it is perjury if the matter be under judicial investigation, and if the testimony be material. Nor does it matter that the statement be true, if the witness did not know it to be so. The demurrer to the indictment should have been overruled.

PUNISHMENT.

Ex parte Chase, Idaho, 110 Pac. 1036. *Indeterminate Sentence.* The petitioner was convicted of a felony before an indeterminate sentence law took effect, and was sentenced under that law to a term of from five to fifteen years in the penitentiary, instead of under the law in force when the crime was committed as the statute required. The minimum sentence under the prior law was five years' imprisonment. Held, the sentence was not void ab initio because of the excess but was good as far as the authority of the court extended, and therefore the prisoner was not entitled to be discharged until the expiration of the five years, which may be shortened by good behavior.

Ex parte Cook, Cal., Ct. of App. 110 Pac. 352. *Escape from Prison.* A statute provided that a prisoner who escaped from the state prison should be punished by a term equal in length to the term he was serving when he escaped. Another section made the attempt to escape a felony, and a third section provided a punishment. Defendant had escaped from the state prison and was convicted of an attempt to escape. Held, the first section of the statute was probably unconstitutional as it operated with manifestly unjust and unwarranted inequality upon prisoners who had escaped, and hence denied the equal protection of the law guaranteed by the fourteenth amendment of the federal constitution, and did not have a uniform operation as required by the state constitution of all laws of a general nature. But the offense of attempting to escape, as defined by the second and punished by the third section, is entirely distinct from and in no manner dependent for its force and vitality on the provisions of the first section, as the legislature has the power to punish the attempt to escape regardless of whether it makes the actual escape a crime, the invalidity of the first section does not affect the remaining two. As the crime of attempting to escape from the state prison is necessarily included in the act of escape, the conviction should be sustained.

RECEIVING OF STOLEN PROPERTY.

State v. Moxley, Mont., 110 Pac. 83. *Variance.* An information charging the felonious receipt of stolen property alleged that the defendant bought "cer-

tain carpenter tools (a more particular description of which said carpenter tools is to the county attorney aforesaid unknown) of the personal property of one E. G. Johnson, Charles Johnson, and C. M. Rude." The proof was that most of the tools belonged to E. G. Johnson, that two saws belonged to Charles Johnson, and a square to Rude. Held, a fatal variance, as the information charge a joint-ownership, while separate ownership was proved. As the tools were not identified otherwise than by the statement of ownership the plea of former jeopardy would be no defense to a subsequent charge of having received the tools owned by either of the Johnson's or by Rude.

SALE OF INTOXICATING LIQUORS,

Ex parte Lockman, Idaho, 110 Pac. 253. *Construction of Statute.* On a *habeas corpus* petition it appeared that the prisoner was held under process on a charge of selling intoxicating liquors illegally. The statute provided that intoxicating liquors should be deemed to include "spiritous, vinous, malt, and fermented liquors, and all mixtures and preparations thereof, including drinks and other bitters which may be used as drinks, or that may be used as a beverage and produce intoxication." It was proved that the petitioner sold a malt liquor known as "near-beer," which contained one and twenty-eight hundredths per cent of alcohol and seven and one-tenth per cent of malt extract. It was also proven that a person could not drink enough of it to intoxicate him unless in rare instances. Held, the legislature intended: First, to prevent intoxication and intemperance from the use of intoxicants; second, to prevent the young men and boys of the state from acquiring the taste for intoxicants, and from acquiring the habit of indulging in drinks and beverages that contained the intoxicating elements. It, therefore, defined all spiritous, vinous, malt, and fermented liquors as intoxicating irrespective of the amount of alcohol they may contain and whether or not they will in fact produce intoxication. The clause, "that may be used as a beverage and produce intoxication" is restricted to all mixtures and preparations thereof including bitters and other drinks. Hence the petitioner was properly in custody and was remanded.

SEARCHES AND SEIZURES.

U. S. v. Mills, 185 Fed. 318. *Indictment.* Defendants having been indicted for conspiracy to defraud the United States of money due or to become due on imported merchandise by means of a false and fraudulent invoice, a bench warrant was issued referring to the indictment and commanding the marshal to arrest the defendants, describing particularly the persons to be seized, but not "particularly describing the place to be searched and the things to be seized" as required by the Const. U. S., Amend. 4. Under this warrant the marshal seized not only the documents concerning the particular importation, but also all books and papers of defendants' firm covering their business as importers of silks, veilings, laces, etc. Held, such seizure was improper, and that the marshal and district attorney would be required to surrender the books and papers so seized, though after examination the district attorney claimed they showed the commission of other offenses which he intended to submit to the grand jury.

SELF-INCRIMINATION.

Commonwealth v. Cameron, Po., 79 Atl. 169. *Nature of Immunity.* Exemption from compulsory self-incrimination is not a natural right, nor a right secured by the federal constitution, which a state constitution cannot take away or abridge.

Const. art. 3, sec. 32, providing that a person may be compelled to testify in a judicial proceeding against one charged with bribery or corrupt solicition, and shall not be permitted to withold his testimony upon the ground that it may incriminate him, but that such testimony shall not be afterwards used against him in any judicial proceeding except for perjury in the giving of such testimony, does not give such witness immunity from prosecution for an offense in relation to which he is compelled to testify.

WIFE ABANDONMENT.

Green v. State, Ark., 131 S. W. 463. *Constitutionality of Statute.* A statute making it a crime to abandon one's wife without good cause, and to fail to maintain and support her is constitutional. The performance of the duties arising out of marriage affects not only the particular parties but the public at large, for upon the existence of the family relations rests the well-being of society.